

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY VINCENT BURR,

Defendant-Appellant.

UNPUBLISHED

April 1, 2003

No. 236375

Oakland Circuit Court

LC No. 2001-176378-FH

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of felonious driving, MCL 752.191. Defendant was sentenced as a fourth habitual offender, MCL 769.12 to forty-six months' to fifteen years' imprisonment. We affirm.

Defendant was charged with felonious driving connected with a motor vehicle accident that severely injured a person. Trial testimony showed that early in the morning of October 21, 2000, defendant was driving his vehicle at an estimated sixty-five to seventy miles per hour, exceeding the forty-five mile per hour limit. Witnesses stated that defendant lost control of his vehicle behind a slow-moving truck, swerved across the center lane, and collided head-on with the victim's vehicle. The victim was severely injured and became comatose for two months. Evidence indicated that defendant was under the influence of alcohol while driving.

Defendant first argues that the trial court erred in refusing to instruct the jury on the necessarily included lesser offense of reckless driving. We disagree.

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), our Supreme Court held that "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.¹ A failure to include a misdemeanor instruction is non-constitutional error. *Id.* at 363. If

¹ "Our decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). An appeal had been filed in the case at hand when
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the error is preserved for appeal, defendant must show that “it is more probable than not that the failure to give the requested lesser included misdemeanor instruction undermined reliability in the verdict.” *Id.* at 364.

The felonious driving statute provides that

[e]very person who drives any vehicle upon a highway carelessly and heedlessly in wilful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property and thereby injuring so as to cripple any person, but not causing death, shall be guilty of the offense of felonious driving...²

Michigan’s reckless driving statute states that “[a]ny person who drives any vehicle upon a highway...in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.” MCL 257.626(a). Comparing the two statutes reveals that reckless driving is a necessarily included lesser offense of felonious driving.

At trial, defendant conceded in his opening statement and closing argument that the victim sustained a “crippling” injury—an element of the greater offense of felonious driving but not an element of the lesser offense of reckless driving. Because the crippling injury element of the greater offense was not in dispute, the court ruled that an instruction on the lesser-included offense of reckless driving need not be given. The court reasoned that the only disputed factual issue was whether defendant negligently drove his car, which is an element of both offenses. Defendant contends that the offense of felonious driving constitutes more than reckless driving plus a crippling injury, and that the prosecution was therefore required to prove an additional element: that the grossly negligent driving was a substantial cause of the victim’s injury.³

Defendant’s claim of error fails. Review of the record indicates that causation was not a disputed factual element in this case. There was no dispute that the cause of the victim’s injuries was defendant’s vehicle striking the victim’s vehicle. Defendant argued that the collision was caused by an accident, and not by negligent driving on his part. However, negligent driving is an element of both offenses, and therefore in this case a conviction of felonious driving did not require the jury to find a disputed factual element that is not part of the lesser included offense. Under the first prong of *Cornell*, this case did not involve a disputed factual element distinguishing between felonious driving and reckless driving.

Finally, even if there had been such a disputed factual element, defendant’s claim fails *Cornell*’s second prong requiring that a rational view of the evidence support an instruction on

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Cornell, *supra*, was decided.

² This statute was repealed by P.A.2001, No. 134, 1. Felonious driving is now covered under MCL 257.626(c).

³ We note that the trial court instructed the jury that defendant’s negligence had to have been a substantial cause of the collision.

the lesser offense. The evidence strongly suggested that defendant had been both intoxicated and speeding, and the jury necessarily found that he drove his car in a negligent manner. A rational view of the evidence as a whole does not support defendant's vague contention that the jury could have concluded that the collision was "just an accident." Once the jury determined that defendant operated his vehicle with willful and wanton disregard for the safety of others, a finding that the injuries were caused by some other force would not be supported by a rational view of the evidence. Defendant's conceding to crippling injuries necessarily meant that if the jury found gross negligence, which it must find to convict defendant of either offense, then defendant must have created the conditions leading to the collision and was therefore guilty of felonious driving.

Defendant also argues that the trial court erred when it permitted the prosecution to introduce evidence of the victim's injuries, where defendant was willing to concede that the victim had suffered crippling injuries. We disagree.

Defendant filed a motion in limine arguing that because he was willing to stipulate to the "crippling injury" element of the charge, any evidence of the victim's injuries would be irrelevant and would be more prejudicial than probative. The trial court ruled that the injuries were relevant regardless of any stipulation, and that this evidence was not unfairly prejudicial. The victim ultimately did so testify to his injuries. Defendant claims that he suffered unfair prejudice because of the possibility that the jury's decision was based on emotion.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). To be relevant, evidence must be material and probative. MRE 401, 402. "Materiality" refers to whether the matter is at issue in the case. *People v Mills*, 450 Mich 61, 67-68; 537 NW2d 909 (1995). "Probative" refers to the tendency to make the existence of a fact more or less probable. *Id.* at 68. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "[U]nfair prejudice encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury....Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it...." *People v Harvey*, 167 Mich App 734, 745-746; 423 NW2d 335 (1988).

The entry of a not-guilty plea puts every element of a crime "at issue." *Mills, supra* at 70. Our Supreme Court has rejected a criminal defendant's argument that evidence relating to an undisputed element should be inadmissible. *Mills, supra* at 70-71. "[T]he prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *Id.* at 69-70. Here, the victim's testimony regarding his injuries, the length of his comatose state, and his memory loss all tended to make more probable the existence of the fact that he had suffered crippling injuries. Therefore, the evidence was relevant to establish the crippling injury element of the charged offense. Defendant's offer to stipulate to the injuries did not render the evidence more

prejudicial than probative. The trial court therefore acted within its discretion when it denied defendant's motion to suppress the victim's testimony regarding his injuries.

Affirmed.

/s/ Patrick M Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot